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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 426.

**MILK CONTROL BOARD OF THE COMMON-
WEALTH OF PENNSYLVANIA,**

Petitioner,

against

**EISENBERG FARM PRODUCTS, a
Pennsylvania Corporation,**

Respondent.

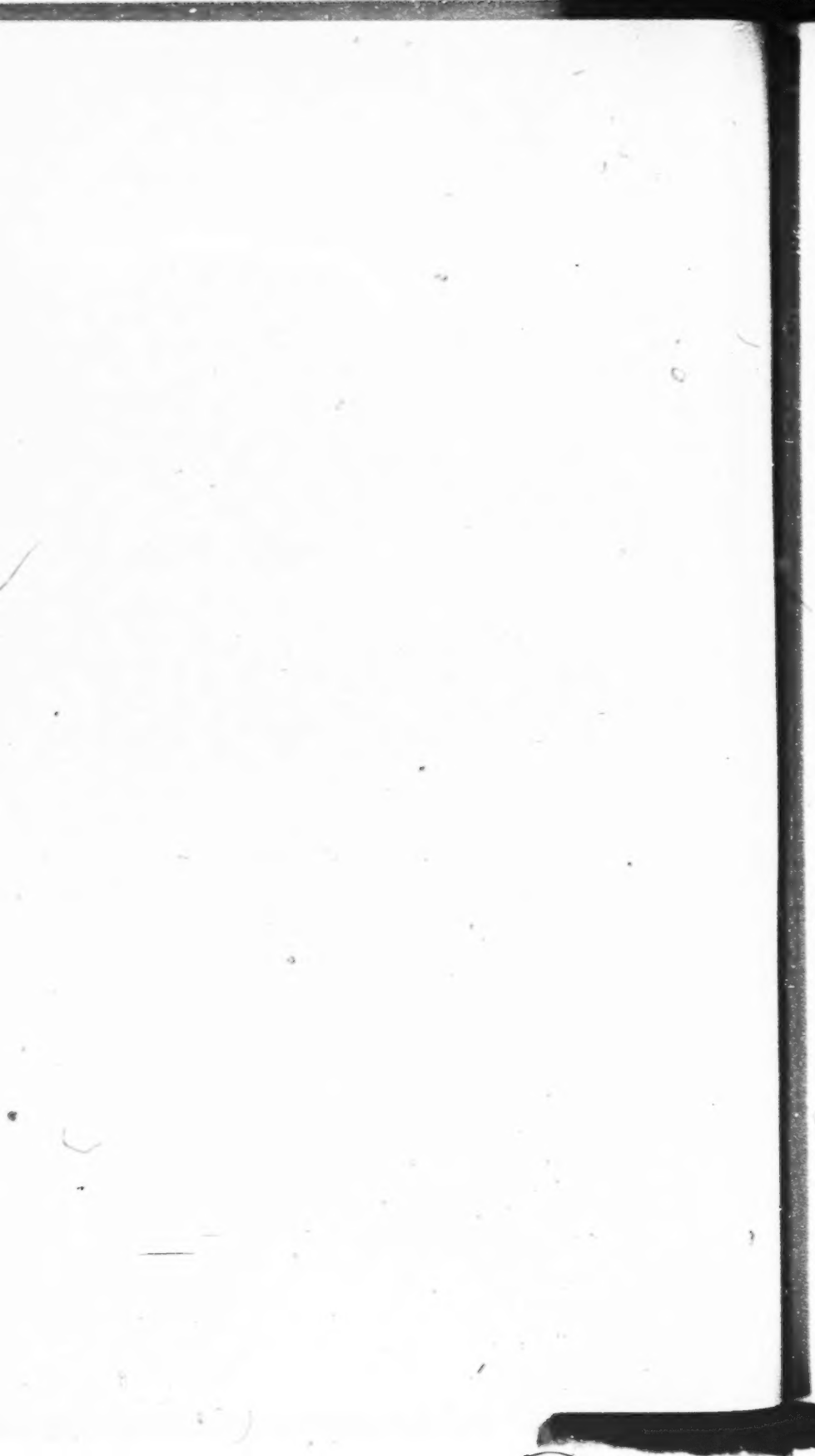
**PETITION AMICUS CURIAE OF COMMISSIONER
OF AGRICULTURE AND MARKETS OF THE
STATE OF NEW YORK IN SUPPORT OF WRIT
OF CERTIORARI.**

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STATE OF NEW YORK IN SUPPORT OF WRIT
OF CERTIORARI.

*To the Honorable Chief Justice and the Associate Jus-
tices of the Supreme Court of the United States:*

Your petitioner, the Commissioner of Agriculture and Markets of the State of New York, respectfully urges favorable consideration of the petition for a writ of certiorari in the above entitled case, now pending before this Honorable Court.

The appeal involves the right of a state to require a milk dealer buying milk at its plant within the state from producers within the state to obtain a milk dealer's license, file a bond guaranteeing payments to such producers and to pay at least the prescribed minimum

price, when the milk so purchased is transported into another state for distribution and sale.

The Commissioner of Agriculture and Markets of the State of New York is vitally interested in this appeal and so are New York State's thousands of milk producers. As early as 1913 the New York Legislature passed a law providing for the licensing of milk gathering stations. (Chapter 408 N. Y. Laws of 1913.) In 1915 this statute was amended to provide for the filing with the application for license of a "good and sufficient surety bond." (Chapter 651 New York Laws of 1915.) Although amended from time to time, the bonding law has continued down through the years. It is currently found as section 258-b of the Agriculture and Markets Law and in many ways is similar to the Pennsylvania bonding requirements.

In its present form the New York statute provides:

"§258-b Bonds and enforcement.

1. Each milk dealer buying milk from producers for resale or manufacture shall execute and file a bond, unless relieved therefrom as hereinafter provided. The bond shall be upon a form prescribed by the commissioner, shall be in the sum fixed by him, but not less than two thousand dollars, shall be executed by a surety company authorized to do business in this state, and shall be conditioned for the prompt payment of all amounts due to producers for milk sold by them to such licensee, during the license year. The bond shall be approved by the commissioner.

"2. Upon default by the milk dealer in any conditions of the bond, if there is reason to believe that the milk dealer owes for milk purchased from producers, the commissioner shall give reasonable notice to file verified claims, and may if he deems it advisable fix a reasonable time within which such claims must be filed. The commissioner shall

examine claims so filed and by certificate determine the amounts due upon them. The commissioner may bring an action upon the bond, and for the purposes of such action the certificate determining the amounts due shall be presumptive evidence of the facts therein stated. If the recovery upon the bond is not sufficient to pay all claims as finally determined, then it shall be divided *pro rata* among them.

"3. A milk dealer shall from time to time, when required by the commissioner, make and file a verified statement of his disbursements during a period to be prescribed by the commissioner, containing the names of the producers from whom milk was purchased, and the amount due to the producers thereof. If it appears from such statement or from facts otherwise ascertained by the commissioner that the security afforded to producers selling milk to such milk dealer by the bond does not adequately protect such producers, the commissioner may require such milk dealer to give an additional bond in a sum to be determined by the commissioner, but not more than double the value of the maximum amount of milk purchased from producers in any one month, and not exceeding in any event one hundred thousand dollars.

"4. The provisions of this article relative to a milk dealer buying milk from producers for resale or manufacture shall apply also to a milk dealer buying milk from a co-operative association or buying milk from another milk dealer or handling milk for or in conjunction with another person or persons, whenever protection by bond or otherwise is directed by the commissioner to protect the interests of producers.

"5. If the applicant for a license under this section be a natural person or a domestic corporation, the commissioner may, if satisfied from an investigation of the financial condition of the applicant that the applicant is solvent and possessed of sufficient assets to reasonably assure compensa-

tion to probable creditors, relieve such person or corporation by order from the provisions of this section requiring the filing of a bond until otherwise directed. The commissioner may require, as a condition for so relieving such person or corporation from filing a surety bond, that cash be deposited with a bank or trust company, or bonds of the United States or state of New York be deposited with the director, under such terms as will in his opinion afford producers the protection intended by this section.

"6. Bonds for the license year commencing April first nineteen hundred thirty-five and for subsequent years shall be filed with the applications."

New York's bonding law has been held constitutional by the state's highest court. *People v. Perretta*, (1930 [253 N. Y. 305]; *People v. Beakes Dairy Co.*, (1918) [222 N. Y. 416]. And in *Ten Eyck v. Eastern Farm Products, Inc.* (249 A. D. 891), the Appellate Division of the Third Judicial Department of the New York Supreme Court, citing *People v. Perretta, supra*, declared that "The right of the plaintiff* to require a bond is unquestionable."

In *Pyrke v. Brudno*, (269 N. Y. 652 aff. 243 A. D. 493) the Court of Appeals, without opinion, affirmed an Appellate Division decision holding that a corporate "selling agent" as assignee of the producers it represented in the sale of milk "is entitled to the full protection" of the required statutory bond.

In 1933 New York's Legislature, after an exhaustive investigation (1933 Legis. Doc. 114), passed the Milk Control Law. (Chapter 158 of the Laws of 1933.) In *Nebbia v. New York*, (291 U. S. 502) the first constitutional attack (unsuccessful in its result) was made

*The Commissioner of Agriculture and Markets of the State of New York.

upon that legislation. Mr. Justice Roberts, writing the opinion of this court, observed (p. 521):

"Save the conduct of railroads, no business has been so thoroughly regimented and regulated by the State of New York as the milk industry. Legislation controlling it in the interest of the public health was adopted in 1862 and subsequent statutes have been carried into the general codification known as the Agriculture and Markets Law. A perusal of these statutes discloses that the milk industry has been progressively subjected to a larger measure of control. The producer or dairy farmer is in certain circumstances liable to have his herd quarantined against bovine tuberculosis; is limited in the importation of dairy cattle to those free from Bang's disease; is subject to rules governing the care and feeding of his cows and the care of the milk produced, the condition and surroundings of his barns and buildings used for production of milk, the utensils used, and the persons employed in milking (§§ 46, 47, 55, 72-88). Proprietors of milk-gathering-stations or processing plants are subject to regulation (§54), and persons in charge must operate under license and give bond to comply with the law and regulations; must keep records, pay promptly for milk purchased, abstain from false or misleading statements and from combinations to fix prices (§§ 57, 57 a, 252)."

See also *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194 at 205.

This appeal is not a case where, as in *Baldwin v. G. A. F. Seelig* (294 U. S. 511), title to the milk purchased passed at the creamery in one state and subsequently the milk was transported to, for sale in, New York State to which it was barred because producers of the former state were paid a purchase price below the minimum officially fixed by New York for milk purchased, under similar conditions, from its producers.

In this appeal title to the milk passes in Pennsylvania (R. 16), which requires security for payment to its own producers.

According to the Division of Milk Control of your petitioner's Department of Agriculture and Markets, there are on file for the current license period ending March 31, 1939, 415 surety bonds representing a guarantee for milk purchased of \$2,124,800.00; 160 depository agreements of a value of \$303,594.06 and 32 Federal and New York State government bonds worth \$132,018.75; in all, a total security for milk purchased during the present license year of \$2,560,412.81. New York's producers are vitally concerned.

In many essential respects Pennsylvania's Milk Control Act follows the New York Milk Control Law. *Rohrer v. Milk Control Board* (322 Pa. 257.) Conditions, generally, in the dairy industry are much the same. But if the Pennsylvania decision herein prevails, it is not improbable that the security on file with your petitioner will be impaired, since many metropolitan milk dealers now buying from producers in upstate New York ship the milk via railroad or motor truck through Pennsylvania and New Jersey into New York City. Milk purchased from New York producers at plants within New York State is also shipped to Pennsylvania, New Jersey and New England markets.

It is therefore respectfully submitted that it is of foremost importance to the State of New York to preserve those established factors of assured payment which long experience has taught keep open the flow of pure, wholesome milk from farm to city.

WHEREFORE, the undersigned, as Commissioner of Agriculture and Markets of the State of New York, respectfully prays that the petition be granted.

Albany, New York, November 4, 1938.

HOLTON V. NOYES,
*Commissioner of Agriculture and
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